Supreme Court of the United States

October Term 1945.

No. 566

LANSBURGH & BRO., a Corporation, *Petitioner*,

v.

DORIS E. DEFFEBACH, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

AUSTIN F. CANFIELD,
EUGENE YOUNG,
Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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CITATIONS.

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v.

DORIS E. DEFFEBACH, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Lansburgh & Bro., a corporation, in support of this petition for a writ of certiorari to be directed to the United States Court of Appeals for the District of Columbia, to review a judgment entered therein on the third day of September, 1945, respectfully shows:

SUMMARY STATEMENT OF THE CASE.

This is a civil action instituted in the District Court of the United States for the District of Columbia, by the respondent, Doris E. Deffebach. She seeks to recover dam-

ages for personal injuries suffered by her on the 17th day of January, 1942, as the result of the burning of a chenille robe then being worn by her, which she had two weeks previously purchased from petitioner, the operator of a department store in the District of Columbia. The respondent pitched her claim upon a breach of implied warranty on the part of petitioner and expressly rejected any claim of right to recover under the laws of negligence, both in her complaint, in the pretrial order, and during the progress of the trial.

It appears from the record that on January 3, 1942, the respondent, forty-four years of age, and a law school graduate, was shopping for lounging robes. She had purchased one at the Hecht Company and then went to the basement in petitioner's store and purchased "a blue sort of Copenhagen blue chenille robe with a soft nap or pile or design of robe and it was a coat style robe." The robe when worn, folded over the right side into strings which were tied, then the outside flap folded over and was tied with a short sash which had to be tied into a double knot to secure it. Respondent wore the robe a couple of times between the date of its purchase on January 3, 1942, and the date of the accident on January 17, 1942. It had not been laundered or cleaned.

At the time of the purchase of the robe, it was on display with others on a rack in petitioner's store. Respondent tried on various robes. No salesgirl waited on her. She finally selected the robe in question and took it over to the salesgirl, had it wrapped up and took it home. She testified that she was familiar with chenille and up until the night of the accident "she had used the robe as an ordinary robe would be used." On Saturday afternoon, January 17, 1942, respondent was home with a cold. Friends called upon her and she and they had drinks of whiskey which was furnished by one of the guests. They then went out to dinner and returned to the respondent's apartment and discussed matters incident to law school activities. During this time further drinks were served. Late in the evening, as the guests were leaving, respondent invited a female friend to

spend the night with her. At this time the respondent, wearing the robe, lighted a cigarette, after which she attempted to flick the match out by a downward fanning or waving of the lighted match, while engaged in conversation with the guests. She did not succeed in fanning out the match flame but on the other hand brought it into contact with the robe which took fire immediately. The flames shot up to the left shoulder and part of the back. The guests attempted to beat the flames out with their hands but were unsuccessful and then knocked the respondent to the floor and finally smothered the flames. The robe was exhibited to the jury. The respondent was badly burned and was hospitalized, requiring medical care for considerable time after the occurrence.

At the end of respondent's case, petitioner's counsel moved for a directed verdict pointing out that the robe in question was an ordinary cotton garment; that there was no testimony in the record to show that the cloth had been treated or impregnated with chemicals or inflammable materials, and that the respondent, having had ample opportunity to do so, had made a careful examination of the robe before purchase and, there being no evidence of any hidden or latent defects, respondent could not recover; also, that respondent could not recover under the statute invoked. The court directed a verdict and in doing so delivered the following opinion.

> "The Court (Bailey, J.): Members of the Jury, this suit is a suit on what is called an implied warranty; that is where anyone purchases goods, the seller implies that those goods are reasonable and suitable for the purpose for which they are bought. The law, however, provides that if the buyer has examined the goods, there is no implied warranty as regards the effect which such examination ought to have revealed.
>
> Now, there is no claim here, no evidence, that there was any chemical or other material impregnated in this garment that would not appear on the surface. It was simply a garment, which you might say was fuzzy on

its surface, and one which might burn more freely than a garment of open material.

So that, under the law, I think there is no implied warranty, and I will give you that order, to return a verdict for the defendant."

An appeal was taken from the judgment on the verdict so directed, to the United States Court of Appeals for the District of Columbia. In that court it was argued before, and the opinion was that of three of the six Justices authorized for that court, namely Justices Edgerton, Miller and Arnold. Chief Justice Groner and Justice Stephen did not participate in the hearing or decision. There was one vacancy in the Court.

The Court of Appeals on June 29, 1945, reversed the judgment of the trial court and handed down its opinion, which is published in 150 Fed. 2d 591. Petitioner filed a petition for re-hearing or modification of the opinion and a petition for consideration of petition for re-hearing or modification by entire court, Justice Arnold having resigned on the 9th day of July, 1945, and Justice Miller having resigned, effective October 1, 1945, and then on vacation and not active on behalf of the Court, which petition and motion were overruled on September 3, 1945.

QUESTIONS OF LAW PRESENTED.

1. An interpretation of Title 28, Section 1115 D. C. Code of 1940.
2. Does the opinion of the United States Court of Appeals for the District of Columbia deprive petitioner of the right to have important issues of fact settled by a jury upon a re-trial of this case?
3. Is the opinion of the United States Circuit Court of Appeals in interpreting the statute (Uniform Sales Act) in conflict with the almost uniform weight of authority?
4. Rehearing by full Bench.

JURISDICTION.

Jurisdiction is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936) United States Code and Rule 38 of the revised rules of this Court, in particular Subdivision 5 thereof.

STATUTES INVOLVED.

The only Statute involved and pertinent to a decision in this case is the following:

> D. C. Code 1940, Title 28, Section 1115. "Subject to the provisions of chapters 11-16 of this title and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:
>
> Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose. * * *
>
> If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed. * * * (Mar. 17, 1937, 50 Stat. 32, ch. 43, §15.)"

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. The questions here presented are based upon the apparent conflict between the ruling of the United States Court of Appeals for the District of Columbia and other State and Federal decisions interpreting the Uniform Sales Act.

2. The opinion of the United States Court of Appeals for the District of Columbia seemingly deprives petitioner of its right to trial by jury of important issues of fact in the event of a re-trial of the case.

3. Petitioner is entitled, as a matter of right, to have its motion for re-hearing heard and determined by members of the Court duly qualified to sit thereon.

WHEREFORE, petitioner respectfully prays the allowance of a writ of certiorari to the United States Court of Appeals for the District of Columbia to the end that the record in said cause may be removed to this Honorable Court and that the errors complained of may be examined and corrected and said judgment reversed.

Respectfully submitted,

AUSTIN F. CANFIELD,
EUGENE YOUNG,
Attorneys for Petitioner.

Supreme Court of the United States

October Term 1945.

No. ———

LANSBURGH & BRO., a Corporation, *Petitioner*,

v.

DORIS E. DEFFEBACH, *Respondent*.

BRIEF IN SUPPORT OF PETITIONER OF CERTIORARI.

1. Was the Action of the Trial Court in Directing a Verdict Correct as a Matter of Law?

This point was covered by the main Assignment of Error in the Court of Appeals. Respondent, as appellant in that Court, vigorously contended that at the end of the plaintiff's case there was sufficient evidence to establish a prima facie case and that the trial court had erred in granting petitioner's motion for a directed verdict. It was conceded in the Court of Appeals that the respondent as plaintiff had rejected recovery on any theory of negligence and had pitched her right to recover solely and entirely, on the statute, supra.

Petitioner recognizes that the rule of caveat emptor may have been modified to some extent by the Uniform Sales Act,

or by the trend of recent decisions, but it asserts that the rule has not been obliterated from the field of American jurisprudence. In this jurisdiction, for a claimant to recover on an implied warranty, the case must be brought within the full scope of the statute. *Hanback* v *Dutch Baker Boy, Inc.*, 70 U. S. App. D. C. 398, 107 F. 2d, 203. If the facts of the case fail to meet the requirements of the statute, then the rule of caveat emptor still obtains. Respondent, at the trial below, specifically advised the Court, through counsel, that she relied upon Section 1 of the Act. An analysis of this section indicates that two things must obtain, viz., (a) the plaintiff either expressly or by implication must have made known to the defendant the particular purpose for which the robe was required, *and* (b) it must appear that the plaintiff relied on the seller's skill or judgment, before an implied warranty of fitness may be relied on. The record discloses that the respondent was familiar with *chenille*. There is no question but that the robe was made of chenille. Respondent, knowing what she wanted, went to a rack on which the robe was displayed with other robes, and without engaging in any conversation with a salesgirl or anybody else in the employ of petitioner, she selected the garment and asked one of the salesgirls in the store to wrap it up. The record discloses that she knew the material from which the robe was made up was loose and fluffy and that she relied upon her own skill and judgment in the selection of the garment. There is nothing in the record to indicate that respondent made known to the store employees either expressly or impliedly any particular purpose for which the robe was to be used. We contend that it is not enough to argue, that, by a mere sale of a chattel *in esse*, an implication arises that it is fit for the purposes for which it was sold. The statute being in the conjunctive imposes the additional requirement that the buyer actually relied upon the skill, judgment or experience of the seller. Both conditions must co-exist.

Mariash on Sales, Section 120, p. 325.

Wasserstrom v.*Cohen*, 165 App. Div. 171, 150 N. Y. S., 638, 540.

Keenan v. *Cherry & Webb*, 47 R. I. 125, 131A, 309 46 Am. Jur. Sec. 348, p. 533.

Bradenberg v. *Samuel Stores*, 211 Iowa 1321, 235 N.W. 741.

Flynn v. *Bedell Co. of Massachusetts*, 242 Mass. 450, 453, 136 N.E. 252.

The foregoing cases, we believe, are authority for the assertion that the respondent failed to make a case under Section 1 of the Statute and therefore the Court was under a duty to direct a verdict for petitioner.

There is no claim in this case that respondent purchased the robe "by description" from petitioner as contemplated by Section 2 of the statute.

Petitioner further contends that respondent made no showing in the trial court that the robe in question was not as the statute says, reasonably fit for the purpose for which it was purchased. Respondent purchased the robe for the sole purpose of using it as a lounging robe. It is admitted that she wore the robe three or four times before the accident complained of. The only way to determine whether it met the purpose of which it was purchased was to wear it. The plaintiff testified she did, and there is no showing on her part that it did not serve that purpose. In fact, were it not for her own negligence in setting herself on fire, as testified to by her own witnesses, it might still be worn and used as a lounging robe. By almost a unanimity of opinion, the Courts throughout the land have laid down a test to be applied to this particular language of the statute.

> "The implied warranty of the statute that goods sold for a known particular purpose 'shall be reasonably fit for such purpose' (Cl. 1, Sec. 15, Chap. 165, R. S.) measures the buyer's right of recovery and the seller's liability. It is accordingly held that in the sale of wearing apparel, if the article could be worn by any normal person without harm and injury is suffered by the pur-

chaser only because of a supersensitive skin, there is no breach of the implied warranty of reasonable fitness of the article for personal wear." *Ross* v. *Porteous, Mitchell & Braun Co.*, 136 Me. 118, 3A 2d 650, 652, citing

Flynn v. *Bedell Co.*, 242 Mass. 450, 136 N.E. 252, 27 A. L. R. 1504; *Bradt* v. *Hollaway*, 242 Mass. 446, 136 N.E. 254.

"If the purchaser makes known the purposes for which he purchases, it will be enough that the merchandise is good for the ordinary purpose of such merchandise. If a special purpose is desired it must be indicated."

Mariash on Sales, Section 119, p. 325.

In nearly all of the decisions the Courts seem to indicate that the implied warranty as to the quality or fitness for any particular purpose means a warrant of "merchantability." The Courts have likewise defined the warrant of merchantability as follows:

"That the coat was fit to wear not for any particular length of time or satisfactorily to the buyer but to wear as an article of apparel. The one way to know whether a coat was so fit to wear was by wearing it." *Bradenberg* v. *Samuel Stores*, 211 Iowa 1321, 235 N.W. 741.

"Fitness for the purpose meant no more than merchantability; it did not mean adaptability for some special use."

Standard Rice Co. v. *P. R. Warren Co.*, 262 Mass. 261, 159 N.E. 508.

"The term 'merchantable' does not require that the article shall be of first quality, but means that the article shall be vendible upon the market in the ordinary course of business and at the average price of such article, having in view the kind of article referred to in the contract." *Goldmark* v. *Simon Bros. Co.*, 110 Nebr. 614, 194 N.W. 686.

"And 'salable or merchantable' does not only mean that it may or should be sold in the market, but it also means, as defined by this court, "that it shall be of ordinary quality, marketable quality, bring the average

price, at least of medium quality or good class, good lawful merchandise of suitable quality, good and sufficient of its kind, free from any remarkable defects.' "
Stevens Tank, etc. Co. v. *Berlin Mills Co.*, 112 Me. 336, 92 A 180.

2. An Interpretation of Title 28, Section 1115 D. C. Code of 1940 (Uniform Sales Act).

As indicated, supra, respondent at the trial stated unequivocally that recovery was predicated on Paragraph 1, Section 1115, Title 28 of the Statute. As we indicated, no reliance was placed upon Paragraph 2 which covers sales "by description." We contended at the trial of the action as well as in the Court of Appeals that Section 1 was modified by Paragraph 3 of Section 28-1115 of the statute. The Trial Court accepted that contention. The record discloses that on direct examination the respondent testified she examined the robe at the time of purchase "for *texture*, color, style and design." The Court of Appeals in its opinion adopted this quotation, entirely ignoring respondent's admission on cross-examination that she knew what chenille was and that she examined it very carefully. She admitted that she knew it was a chenille robe and that it was a soft pile material, fluffy in its texture. Could there be anything clearer within the meaning of the statute to justify our contention that the plaintiff inspected the robe to such an extent that Paragraph 3 of the statute was applicable as the Court applied it below? Mariash on Sales, PP. 329, Section 121. The authorities seem to be uniform, contrary to the opinion of the Court of Appeals, to the effect that if an examination by the purchaser reasonably discloses the nature and composition of the article as it appears to the senses and that there were no latent defects which could not be disclosed or discovered by such an examination, then, there is no implied warranty. There is no evidence in the record to show that the robe contained hidden or latent defects. There is no showing below and no contention was

made in the Court of Appeals that the fabric or finished garment was at any time impregnated with chemicals or compounds such as could not be detected by examination or such as would make the garment harmful to the human body when worn, nor such as would attract fire or cause quick combustion any more than countless other articles made from cotton pile too numerous to mention, and which every woman, if not every man, knows will take fire and burn very rapidly when brought into contact with open flame. Nor was there any showing made to prove or tend to prove that at this time, the textile industry, the chemical industry, fire prevention organizations, or anybody else has been able to process or treat cotton fabrics so as to make them permanently fire proof or fire retardant. The only evidence in the record in support of the plaintiff's case touching on the matter of the likelihood of the robe taking fire when brought into contact with flame was that of the witness Baker, a textile expert, who indicated that he had made a test of a sample of the plaintiff's robe to establish the safety factor of the fabric and testified as a result that it had a very low resistance to flame and only a fraction of a second was required for ignition, that fraction of a second being immeasurable and that from the ignition point the flame flashed across the surface of the fabric spreading the flame rapidly and consuming the sample entirely. But he also testified that he had made similar tests of other chenille which he had acquired on the open market and the comparison test samples, like the sample from the plaintiff's robe, were constructed entirely of cotton of the chenille type; and that each of the samples would burn if brought into contact with flame, the only difference being that the sample taken from the plaintiff's robe would burn much more rapidly than the comparison samples.

The opinion of the Circuit Court indicates an interpretation of Sections 1-3 of the Statute. It assumes, as a matter of law that the respondent could not, by her own examination have ascertained that the material used in the robe

was inflammable and that it would take an expert to establish that fact. We assert that this position is not contemplated by the language of the statute. It is a matter of common knowledge that by and far a large proportion of garments and household furnishings are made from cotton. It is also a matter of common knowledge that any loosely knit cotton, such as was used in the manufacture of the robe, will take fire if brought into contact with flame; some, depending on the nature of their unfinished surface will burn more rapidly than others but if the purchaser examines carefully, as this respondent admitted she did, then, unless there are hidden defects which such an inspection would not reasonably disclose, Section 3 of the Statute must be applied, and claimant denied recovery or at least it would still be a question of fact for a jury to pass upon. This the Court in its opinion seems to reject and holds in effect that where an expert would testify that material from which the garment was made will take fire instantly and burn rapidly then, as a matter of law there is breach of the implied warranty. This we contend will make the manufacturer or vendor an insurer. Such is not the purpose of the statute.

3. The Opinion of the United States Court of Appeals for the District of Columbia Deprives Petitioner of the Right to Have Important Issues of Fact Settled by a Jury Upon a Re-trial.

As we have indicated, the appeal from the trial court was predicated upon the theory that the court was in error in directing a verdict for petitioner, and was in error as to its rulings on the admissibility or rejection of evidence. In its opinion, the Court, contrary to the almost universal weight of authority, reversed the judgment of the Trial Court. It reversed the action of the Court in granting the motion for directed verdict at the end of plaintiff's case, and in no respect passed upon the questions as to the admissibility or rejection of the evidence. Although the matter of instructions to the jury was not, and could not properly have been

presented on the appeal and was not briefed or argued, the Court of Appeals in its opinion concludes with this language.

> "Accordingly, we think the jury should have been instructed that if the robe caught fire and burned as the witnesses testified, there was a breach of appellee's implied warranty of fitness."

Since the case would have to be re-tried under the judgment of the Court of Appeals, it seems to us that this language of the opinion will deprive petitioner of its right to have a jury pass on this issue as a question of fact, thereby depriving it in part of its Constitutional right of a trial by jury. It precludes the right of the petitioner to have the jury pass on such facts as the respondent's knowledge of the texture of the garment, its evident tendency to catch fire and burn rapidly if negligently brought into contact with fire, the fact that this garment is no different in texture, composition, etc., than other cotton garments made of loose open-end cotton, so many of which have been on sale and are still on sale every day in every wearing-apparel store in the country and many other questions which must necessarily create issues of fact and which only the jury, by their verdict, could settle. The Court's opinion definitely rules as a matter of law that respondent is entitled to recover upon no other basis than the flammability of the robe, leaving the jury to settle no other issues of fact except the amount of the verdict. The court does not cite a single case in its opinion as authority for the position it takes and as we have said before, the opinion is seemingly in the very teeth of the universal weight of opinion construing the Uniform Sales Act. See cases supra.

4. The Opinion of the United States Circuit Court of Appeals in Interpreting the Statute, Supra, is in Conflict with Almost the Uniform Weight of Authority.

The cases herein cited deal with interpretation of the Uniform Sales Act (supra) in other jurisdictions throughout the country. A reading of these cases, we believe, will convince the Court that the opinion of the Court of Appeals is in direct conflict therewith. We repeat, that the Court of Appeals in its opinion failed to cite any case as authority for the position it took in its opinion. The opinion of the Court of Appeals in effect makes petitioner, as well as every other merchant engaged in the business of selling cotton fabrics, an insurer that it would be fire-proof. When manufacturers undertook to create and market cotton garments treated with chemicals, compounds of other substances known to be dangerous whether from the results of fire or from ordinary contact with the human body, the law recognizes to some extent the application of an implied warranty, but we are unable to find any decision which would seem to indicate the imposition of an implied warranty on the manufacturer or vendor of cotton fabrics as to which, because of the very nature of cotton itself, combustion occurs when brought into contact with open flame. That is what the opinion of the Court of Appeals seems to hold and to that extent it is in conflict with the great weight of authority. Cases cited, supra. For that reason we earnestly believe that it requires an expression from this Court since it will require an interpretation of the Uniform Sales Act in force and effect in Thirty-four of the States.

5. The Petition for Re-hearing Should Have Been Granted by the Full Bench of the Circuit Court.

A petition for re-hearing or for modification of the opinion was filed within the time permitted by the rules of the Court of Appeals together with a motion for leave to file a petition to have the same heard by the remaining members of

the Bench of that Court. It was pointed out that Mr. Justice Arnold had resigned and was no longer eligible to pass on the matter; and that Mr. Justice Miller had resigned, which resignation was to be effective October 1, 1945, he being then out of the jurisdiction and not available to pass upon the merits of the motion. The orders of the Court overruling both the petition and motion are before this Court. We believe that petitioner was entitled to have its petition for re-hearing passed upon as provided for by the rules of the Circuit Court and since that was not possible as we viewed it, that the full Bench should re-hear the case *de novo*.

CONCLUSION.

We earnestly contend that the position presents a matter of such importance to the public, as well as to the cotton-garment industry, as to call for an expression from this Court interpreting the Uniform Sales Act under the facts and circumstances disclosed by the record herein.

Respectfully submitted,

AUSTIN F. CANFIELD,
EUGENE YOUNG,
Attorneys for Petitioner.

IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court directing a verdict in favor of plaintiff was entered on October 5th, 1944 (R. 42). The opinion of the Court of Appeals of the District of Columbia, reversing the judgment of the District Court (R. 45-46) is reported in 150 Fed (2d) 591.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered June 29, 1945 (R. 47). The petition for a writ of certiorari was filed on October 29th, 1945. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

SUMMARY STATEMENT OF THE CASE

This is a civil action instituted in the District Court of the United States for the District of Columbia, by the respondent, Doris E. Deffebach. She seeks to recover damages for personal injuries suffered by her on the 17th day of January 1942, as the result of the burning of a chenille robe then being worn by her, which she had two weeks previously purchased from petitioner, the operator of a department store in the District of Columbia. The respondent pitched her claim upon a breach of implied warranty on the part of petitioner and expressly rejected any claim of right to recover under the laws of negligence, both in her complaint, in the pretrial order, and during the progress of the trial.

It appears from the record that on January 3, 1942, the respondent, forty-four years of age, and a law school graduate, was shopping for lounging robes. She had purchased one at the Hecht Company and then went to the basement in petitioner's store and purchased "a blue sort of Copenhagen blue chenille robe with a soft nap or pile or design of robe and it was a coat style robe." The robe when worn, folded over the right side into strings which were tied with a short sash which had to be tied into a double knot to secure it. Respondent wore the robe a couple of times between the date of its purchase on January 3, 1942, and the date of the accident on January 17, 1942. It had not been laundered or cleaned.

At the time of the purchase of the robe, it was on display with others on a rack in petitioner's store. Respondent tried on various robes. No salesgirl waited on her. She finally selected the robe in question and took it over to the salesgirl, had it wrapped up and took it home. She testified that up until the night of the accident "she had used the robe as an ordinary robe would be used." On Saturday afternoon, January 17, 1942, respondent was home with a cold. Friends called upon her and she and they had "a highball or two—I am not positive which—in the afternoon" (R.-29). They then went out to dinner and returned to the respondent's apartment and discussed matters incident to law school activities. Respondent did not have anything further to drink. Late in the evening, as the guests were leaving, respondent invited a female friend to spend the night with her. At this time the respondent, wearing the robe, lighted a cigarette. "Whether in fanning out the match the robe ignited or whether a spark shot from the match and ignited the robe, I don't know because, like this, I was a shot of flames; I was just covered with flames." (R-24). "At the same moment I saw a blue flame, shot with red at the extreme top, shooting over her left shoulder, and up on the left part of her back." (R-6). "It happened so suddenly that it was almost, well, quicker than you snap your fingers almost. I have never seen anything like it." (R-7). "It was perfectly awful. Naturally, I was horrified. Mr. Cooney and I both jumped for her. I dropped what I had in my hands, the coats, on the floor, and sprang for the back of her, and he for the front of her, and I pulled it off from the nape of her neck, or left shoulder and left side of the back. Mr. Cooney reached her from the front and pulled this robe from the left front. This robe had been tied around her waist with a double knot so that it was impossible for us to pull the garment any farther than to her waist."

"Miss Deffebach was so shocked and so hurt that she

screamed several times. We finally got her to the floor—I shouldn't say "finally" because it wasn't but a second before I got her on the floor, and reached for the small scatter rug but, realizing that the scatter rug wasn't going to be large enough to completely cover her because she was partly on it, I reached for the cover on this day bed and wrapped that around her, thereby smothering the flames." (R-7).

What was left of the robe was exhibited to the jury. The respondent was badly burned and was hospitalized requiring medical care for months after the occurrence.

At the end of respondent's case, petitioner's counsel moved for a directed verdict, which was granted as follows:

> "The Court (Bailey, J.): Members of the Jury, this suit is a suit on what is called an implied warranty; that is where anyone purchases goods, the seller implies that those goods are reasonable and suitable for the purpose for which they are bought. The law, however, provides that if the buyer has examined the goods, there is no implied warranty as regards any defect which such examination ought to have revealed.
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> Now, there is no claim here, no evidence, that there was any chemical or other material impregnated in this garment that would not appear on the surface. It was simply a garment, which you might say was fuzzy on its surface, and one which might burn more freely than a garment of open material.
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> So that, under the law, I think here is no implied warranty, and I will give you that order, to return a verdict for the defendant."

An Appeal was taken from the judgment on the verdict so directed to the United States Court of Appeals for the District of Columbia where it was there argued before Justices Edgerton, Miller and Arnold.

The Court of Appeals on June 29, 1945, reversed the judgment of the trial court and handed down its opinion which is published in 150 Fed. 2d 591. A petition for re-

hearing was filed by petitioner on July 6th, 1945. This petition was denied on August 4, 1945 with the notation that Judge Arnold considered the petition for rehearing before he resigned, and was of the view that the petition should be denied. (R-52). Motion for Leave to File Petition for Consideration of Petition for Rehearing or Modification by Entire Court was also filed and denied by the Court on September 10, 1945. (R-53).

QUESTION OF LAW PRESENTED

Did respondent, as a matter of law, submit sufficient evidence at the trial of the case to have the jury pass upon the question of whether or not this robe was reasonably fit for the purpose for which it was sold?

STATUTE INVOLVED

The Statute involved in this case is the following:

> D.C. Code 1940, Title 28, Section 1115. "Subject to the provisions of chapters 11-16 of this title and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:
>
> Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose. * * *
>
> If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed. * * * (Mar. 17, 1937 50 Stat. 32, ch. 43, p. 15.)"

REASONS RELIED UPON IN OPPOSITION TO THE WRIT

Whether or not this robe which burned with such extreme rapidity was fit to be worn is surely a factual question, and whether respondent relied upon the seller's skill and judgment or her own skill in the selection of the robe is also a question for a jury.

ARGUMENT

The only question before the Court of Appeals of the District of Columbia in this case was whether or not the trial court erred in instructing the jury that there was no warranty as the buyer had examined the goods as regards the defect which such examination of it ought to have revealed. Respondent claimed, and still does, that whether or not respondent's examination ought to have revealed the defect which certainly existed in this robe because of its poor construction, was a question which was peculiarly within the province of the jury. As was stated in *Keenan v. Cherry* (47 R.I. 125; 131 Atl. 309):

> "Inasmuch as the fundamental test under the implied warranty is whether the buyer justifiably relies on the seller's skill and judgment, the Uniform Act leaves inspection as an important, but not conclusive, element to be considered in determining the question of reliance. It treats reliance as a question of fact."

Petitioner, in its brief argues that the last sentence of the decision of the Court of Appeals in this case robs it of the opportunity, when the case is retried, of presenting evidence concerning respondent's knowledge of the texture of this garment, her knowledge as to its tendency to catch fire and burn rapidly if brought in contact with fire, and many other questions of fact which only the jury could settle. That sentence is as follows: "Accordingly, we think

the jury should have been instructed that if the robe caught fire and burned as the witnesses testified, there was a breach of appellee's implied warranty of fitness."

This is clearly a correct statement of the law so far as the evidence which the Court of Appeals had before it at the time. What is meant by this sentence, it is submitted, is that upon the state of testimony at the conclusion of respondent's case, there being no evidence to the contrary, the jury should have been instructed that if they believed the evidence as to the manner in which the robe burned that they must find that there was a breach of warranty, unless, of course, the examination which respondent made of the robe at the time of its purchase should have revealed to her its highly flammable quality. It was not necessary for the Court of Appeals to have added in its opinion the matter of inspection because that is stated in the Statute itself as follows:

> "If the buyer has examined the goods there is no implied warranty as regards defects which such examination ought to have revealed."

Certainly, on a retrial of this case, petitioner will have every opportunity to present evidence and argument that respondent's examination ought to have revealed to her that this was a dangerous robe to wear and is not deprived of that opportunity by the opinion of the Court of Appeals because that opportunity is given to it as a matter of law in the Statute itself.

Respondent testified on cross-examination (R-26), "I don't know anything about goods. It looked all right to me. I gave it a very cursory examination. I assumed it would be all right. I certainly would not buy anything if it ever occurred to me that it might ever catch on fire." At a prior trial of this case, on cross-examination she had answered "Yes, I looked at it very carefully." (R-27). Again the issue presented is clearly a jury question.

Petitioner's further point that the petition for rehearing should have been granted by the full bench of the Circuit Court is without merit because the granting of such a petition lies within the discretion of the Court of Appeals itself. Further the petition for a rehearing before the three Justices who heard the argument is clearly covered by the rules themselves which state that a majority of the justices in this case, two of the three, would have to vote to grant a rehearing where, according to the record, the three Justices voted against the rehearing.

CONCLUSION

The decision below is correct and there is no conflict. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied .

Respectfully submitted,

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